ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

Nos. 97-826, 97-829, 97-831

AT&T CORP., et al.,

Petitioners,

v.

IOWA UTILITIES BOARD, et al.,

Respondents.

On Petitions for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

OPPOSITION OF THE REGIONAL BELL COMPANIES AND GTE TO MOTIONS TO EXPEDITE CONSIDERATION OF PETITIONS FOR CERTIORARI

Respondents Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, SBC Communications Inc., U S WEST, Inc., and GTE Entities ("respondents") respectfully oppose the motions of the FCC and AT&T et al. ("AT&T") to expedite consideration of the petitions for certiorari.

Respondents address this opposition primarily to the request that the Court depart from its normal procedures in order to act on a group of related petitions at the Court's conference on January 23, 1998. AT&T's alternative request for accelerated merits briefing is obviously premature. If the Court were to deny certiorari, the issue would be moot. And if the Court were

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to grant certiorari on one or more questions, only then would it be in a position effectively to judge whether the question or questions to be reviewed could be manageably briefed, argued, and decided this Term.

The pending petitions and conditional cross-petitions, and any additional timely petitions and cross-petitions that may be filed in the coming days, should be decided after full briefing by all parties. Indeed, for the reasons set forth below, it is difficult to imagine a case less well suited to rushed decision.

1. The time for filing petitions or cross-petitions for certiorari from the Eighth Circuit's decision in Iowa Utilities Board v. FCC does not expire until 90 days from the court of appeals' order on rehearing entered October 14, 1997: that is, on January 12, 1998. 28 U.S.C. § 2101(c); Sup. Ct. R. 13. The six petitions and conditional cross-petitions filed to date have already generated hundreds of pages of briefs addressing complicated -- and, in some cases, highly technical -- questions arising from a 700-page administrative order.

AT&T and the FCC nevertheless propose expedited consideration of all petitions and cross-petitions before they can even know what that would entail. Well over 100 entities, including a score of state regulatory commissions as well as interest groups and telecommunications industry participants of all description, were parties to the proceedings below. As

matters now stand, no one can say how many petitions there ultimately will be, what issues the petitions and cross-petitions will present, or how many responses and replies will be filed.

What is certain is that AT&T and the FCC would deny numerous parties important rights afforded under this Court's Rules. For example, the time for parties to respond to the Regional Bell Companies' conditional cross-petition will not expire until January 23, 1998. The time for parties to respond to the conditional cross-petition of GTE Midwest Incorporated will not expire until January 28, 1998. The cross-petitioners would then have a right to file timely replies under the Court's usual procedures. Sup. Ct. R. 15.5, 15.6.

Under AT&T's and the FCC's proposal, however, parties who wish to respond to these cross-petitions would be denied their full opportunity to do so. (In fact, counsel for respondents understand from discussions with counsel for certain state commissions that the States will soon consult among themselves to determine whether and how to respond to the cross-petitions.) If these parties did accelerate preparation of their responses to file just before the January 23 conference, the cross-petitioners would then be denied an opportunity to reply. In their haste for a hearing on their own petitions, AT&T and the FCC would have the Court disregard the legitimate interests of dozens of other parties to the case below, on all sides of the issues.

2. AT&T and the FCC suggest that compromising numerous other parties' rights is appropriate because respondents supposedly "withheld" or "postponed" filing their cross-petitions. AT&T Motion at 3, 8; FCC Motion at 6. The assertion is baseless. We will let the facts speak for themselves.

On December 18, 1997 -- within 30 days of being bombarded with four separate petitions -- all five Regional Bell Companies filed a single opposition to all four petitions. On the same day, GTE likewise filed its opposition to all four petitions. Although a request for additional time might well have been justified under the circumstances, respondents did not seek an extension.

Respondents then filed their cross-petitions weeks before they were due. On December 24, 1997 -- nearly three weeks before the deadline and just six days after filing their opposition -- the Regional Bell Companies filed a conditional cross-petition (No. 97-1075). On December 30, 1997 -- nearly two weeks before the deadline -- GTE Midwest filed its conditional cross-petition (No. 97-1087).[1] Each cross-petition was filed as soon as it was ready.

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[1] Respondent U S WEST, Inc. will file today a conditional cross-petition. U S WEST has moved with dispatch to prepare this cross-petition and accordingly will file a week before the deadline. To avoid any needless delay, moreover, it will make clear in its transmittal letter to the Clerk that it will not object if other parties wish to treat their responses to other cross-petitions as responses to U S WEST's cross-petition.

AT&T and the FCC fault respondents for violating a rule of their own imagining, which would require filing cross-petitions on the same day as briefs in opposition. AT&T Motion at 3, 8; FCC Motion at 6. There is no such rule. See Sup. Ct. R. 13.4 (time for filing cross-petitions). Nor could anyone suggest that these cross-petitions were unwarranted: In their responses to the cross-petitions, AT&T and the FCC have both agreed that, if their own petitions are granted, the conditional cross-petitions should be granted in large part as well.

3. Efforts to fault respondents' timely -- indeed, early -- filings are especially inappropriate given that neither AT&T nor the FCC did what they could have done to ensure expedited consideration of their petitions. The Eighth Circuit issued its decision in this case on July 18, 1997. Among other things, that decision resolved the jurisdictional issue on which AT&T and the FCC principally focus in their petitions for certiorari. Because no party sought rehearing with respect to the court's jurisdictional ruling, AT&T and the FCC had ample time to prepare their petitions for certiorari on that issue well before the Eighth Circuit issued its order on rehearing in October.

The other issues raised by AT&T and the FCC do not explain their delay in filing petitions for certiorari. The Eighth Circuit's order on rehearing did not amend that court's prior ruling with respect to the FCC's "pick and choose" rule. See

Regional Bell Company Conditional Cross-Pet. 9-12 (discussing rehearing decision). Although the court of appeals did address FCC Rule 51.315(b) on rehearing, AT&T and the FCC simply repeat in their petitions for certiorari the same arguments they presented to the Eighth Circuit in their responses to the rehearing petitions.

All but a paragraph of the Eighth Circuit's final decision was available to AT&T and the FCC on July 18. If they had been truly intent on doing "everything within their power" (AT&T Motion at 7) to secure this Court's consideration of their petitions in January, AT&T and the FCC would have filed their petitions within days after the court of appeals' October 14 order on rehearing. Likewise, they would have made their request for expedited scheduling at the time they filed their petitions. Instead, AT&T and the FCC waited nearly five weeks after the rehearing decision before filing their petitions for certiorari. See AT&T Motion at 8 n.4. And even then, they did not submit their motions to expedite until six weeks after that. Having chosen to proceed at that pace, neither AT&T nor the FCC can fairly expect this Court to compensate for their delay by short-circuiting its own procedures to the detriment of other parties.

4. Movants' new-found interest in hurrying the Court's deliberations is particularly curious in light of the Eighth Circuit's recent order scheduling oral argument on January 15,

1998, to consider petitions filed by some 33 state commissions, the Regional Bell Companies, GTE, and others to enforce the court's mandate. These petitions argue that the FCC has continued improperly to assert jurisdiction over local pricing matters in violation of the court of appeals' ruling. When it addresses these petitions, the Eighth Circuit may well elaborate on the limits of federal jurisdiction in the pricing area.

Any such elaboration would assist the Court's consideration of the certiorari petitions, particularly because interpretation of the court of appeals' ruling is a matter of dispute between the parties. Compare, e.g., AT&T Pet. 13-16 (claiming that jurisdictional ruling turned on section 2(b) of the Communications Act of 1934), with GTE Opp. 15-21 (explaining that ruling rested on plain language of 1996 Act). Rushing to act on the petitions and cross-petitions shortly before such assistance would be offered would not serve the interests of sound decisionmaking.

5. In attempting to manufacture a reason for granting certiorari, AT&T has alleged that the decision below "squarely conflicts" with a recent D.C. Circuit decision interpreting different provisions of the Telecommunications Act of 1996. See AT&T Pet. 20. There is no conflict between these appellate decisions. See Regional Bell Company Opp. 17 n.8. As it happens, however, the supposedly conflicting decision is itself

the subject of a recent certiorari petition filed by two state agencies. Virginia State Corp. Comm'n, et al. v. FCC, No. 97-1072 (filed Dec. 29, 1997). That petition will be on essentially the same timetable as this case if the Court holds to its customary procedures. This Court's consideration of the statutory provisions at issue in that case -- particularly when contrasted with those on which petitioners rely in this case -- will demonstrate vividly that Congress, in crafting the 1996 Act, knew precisely how to give the FCC intrastate jurisdiction when it wanted to do so. There is thus good reason not to disrupt a schedule that would allow the Court to consider these two cases concurrently.

6. AT&T and the FCC argue that the issues they present are of such pressing national importance that the petitions should be moved to the front of the Court's queue. These claims ring hollow. The same parties presented nearly identical arguments more than 14 months ago in three separate applications to vacate the Eighth Circuit's interim stay of the FCC's pricing rules. They there trumpeted the same dire warnings that they echo here. All three applications to vacate the stay were denied (initially by Justice Thomas, and subsequently by the full Court after referral by Justices Stevens and Ginsburg). See 117 S. Ct. 378 (1996); 117 S. Ct. 379 (1996); 117 S. Ct. 429 (1996). This Court

rightly rejected these inflated claims of extraordinary urgency in 1996, and it should do so again in 1998.

As demonstrated in respondents' briefs in opposition, the AT&T and FCC petitions are not even worthy of review, much less extraordinary expedition. See Regional Bell Company Opp. 10-29; GTE Opp. 12-30. In particular, the assertion that the Eighth Circuit is "largely responsible for the virtual absence of competition in local telephone markets" is preposterous. FCC Motion at 5.

As Congress contemplated, the States have moved ahead with implementation of local competition since enactment of the Telecommunications Act in February 1996. Nationwide, state commissions have reviewed some 1700 negotiated agreements between local carriers and have completed numerous arbitration proceedings to resolve disputed issues under 47 U.S.C. § 252. On the strength of these negotiated and arbitrated agreements, dozens of national and regional companies that are genuinely interested in entering the local telephone business are doing so.

This activity confirms that legal disputes over a few portions of the FCC's Local Interconnection Order have not stalled the development of local competition. The Eighth Circuit upheld, or was not even asked to consider, the vast majority of the rules established by the FCC's 700-page decision. Although the Eighth Circuit did invalidate the FCC's pricing rules, that

action, by the FCC's own account, had little impact because "virtually every state in the union has adopted [the FCC's] policies."[2] It is bizarre for the FCC to argue that state jurisdiction over local pricing prevents competition, when nearly every State has adopted the FCC's own pricing approach. Nor are AT&T's claims of crippling uncertainty defensible where state commissions and the FCC are in accord. See AT&T Motion at 3-6.

The Eighth Circuit's decision to strike down 47 C.F.R. § 51.315(b) also has not slowed local competition. See FCC Motion at 5; AT&T Motion at 7. Rule 51.315(b) was in force from August 1996 to October 1997, yet AT&T and its co-movants -- who now say the rule allowed "the immediate introduction of . . . broad-based local exchange competition" -- by their own admission did not take advantage of it. AT&T Motion at 7.

The Eighth Circuit's decision to vacate Rule 51.315(b) will in fact foster, rather than hinder, the construction of competitive local telephone networks that Congress wished to promote.[3] The issue is whether new local telephone companies will have any incentive to build networks of their own (as

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[2] Reed Hundt, Chairman, Federal Communications Commission, remarks to the Chamber of Commerce, Washington, D.C. (May 29, 1997) (as prepared for delivery).

[3] See, e.g., S. Conf. Rep. No. 104-230, at 1 (1996) (Telecommunications Act "designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies").

Congress intended) or whether they will use existing networks at subsidized prices (as AT&T would like). See Regional Bell Company Conditional Cross-Pet. 14-22; GTE Midwest Conditional Cross-Pet. 18-21. Companies that do seek to build new local networks in competition with incumbent carriers have strongly endorsed the Eighth Circuit's decision. One such new entrant recently said that it "owe[s] a debt of gratitude to the Eighth Circuit" for denying AT&T and others a "free ride."[4] Another explained that the Eighth Circuit's approach restored "the careful balance crafted by Congress," whereas the policies urged by AT&T and the FCC would "frustrate" the congressional goal of opening local markets to full competition.[5]

Whatever the long-term importance of the issues raised, the fate of local telephone competition will not remotely turn on whether the petitions and conditional cross-petitions are considered at the Court's January 23 conference, before the close of the pleading cycle, or in due course under the Court's normal procedures.

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[4] Telecommunications Reports, at 18 (Nov. 10, 1997) (quoted in Regional Bell Company Conditional Cross-Pet. 15 & n.10).

[5] Time Warner Communications Memorandum in Support of Petitions for Rehearing, at 3 (8th Cir. Oct. 1, 1997) (quoted in Regional Bell Company Conditional Cross-Pet. 15-16 & n.12).

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Respectfully submitted,

WILLIAM P. BARR
WARD W. WUESTE, JR.
M. EDWARD WHELAN
GTE Service Corporation
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
(202) 463-5200

PAUL T. CAPPUCCIO*
STEVEN G. BRADBURY
PATRICK F. PHILBIN
JOHN P. FRANTZ
Kirkland & Ellis
655 Fifteenth Street, N.W.,
Suite 1200
Washington, D.C. 20005
(202) 879-5000

Counsel for GTE Entities

JAMES R. YOUNG
EDWARD D. YOUNG III
MICHAEL E. GLOVER
Bell Atlantic Corporation
1320 North Court House Road
Eighth Floor
Arlington, Virginia 22201
(703) 974-2944

Counsel for Bell Atlantic Corporation

MARK L. EVANS*
MICHAEL K. KELLOGG
AUSTIN C. SCHLICK
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, SBC Communications Inc., and U S WEST, Inc.

LAURENCE H. TRIBE
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, Massachusetts 02138
(617) 495-4621

WALTER H. ALFORD
WILLIAM B. BARFIELD
M. ROBERT SUTHERLAND
BellSouth Corporation
1155 Peachtree Street, N.E.
Suite 1800
Atlanta, Georgia 30367
(404) 249-2600

Counsel for BellSouth Corporation

*Counsel of Record

KELLY R. WELSH
JOHN T. LENAHAN
Ameritech Corporation
30 South Wacker Drive
Chicago, Illinois 60606
(312) 750-5000

KENNETH S. GELLER
DONALD M. FALK
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Suite 6500
Washington, D.C. 20006
(202) 463-2000

STEPHEN M. SHAPIRO
THEODORE A. LIVINGSTON
JOHN E. MUENCH
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Ameritech Corporation

MARK D. ROELLIG
DAN POOLE
ROBERT B. MCKENNA
U S WEST, INC.
1801 California Street
51st Floor
Denver, Colorado 80202
(303) 672-2861

WILLIAM T. LAKE
JOHN H. HARWOOD II
JONATHAN J. FRANKEL
SAMIR C. JAIN
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for U S WEST, Inc.

JAMES D. ELLIS
PATRICIA DIAZ DENNIS
ROBERT M. LYNCH
LIAM S. COONAN
MARTIN E. GRAMBOW
DAVID F. BROWN
SBC Communications Inc.
175 E. Houston, Room 1254
San Antonio, Texas 78205
(210) 351-3737

DURWARD D. DUPRE
MICHAEL J. ZPEVAK
Southwestern Bell Telephone Company
One Bell Plaza, Room 2401
Dallas, Texas 75202
(214) 464-5550

STEPHEN B. HIGGINS
JAMES W. ERWIN
Thompson Coburn
One Mercantile Center, Suite 3500
St. Louis, Missouri 63101-1693
(314) 552-6054

Counsel for SBC Communications Inc.